Supreme Court, U.S.

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No.

In The

Supreme Court of the United States

October Term, 1998

RAYMOND RODRIGUE, et al., Petitioner

V.

MAINE STATE POLICE DETECTIVE
GERARD MADDEN, et al., Respondent

On Petition For Writ of Certiorari
To The Supreme Judicial Court of the State of Maine

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the doctrine of qualified immunity does not apply - and affords no protection for police officers - when the police intentionally or recklessly misrepresent the truth in an affidavit in order to obtain a search warrant?

2. Whether Petitioner was constitutionally entitled to have a trial jury on the basis of witnesses - and not the trial judge on the basis of affidavits - determine whether the police intentionally or recklessly misrepresented and omitted information in the affidavit for the search warrant?

3. Whether fourteenth amendment due process is violated when law enforcement officials hold on for over 2½ years to property seized under a search warrant on just the warrant's alleged probable cause and the unsubstantiated claims that the case is "still under prosecutorial review" and "the property is potential evidence in a criminal case," without bringing any criminal charges, a forfeiture action, or other civil action to show by a preponderance of the evidence that law enforcement is entitled to hold on to the property?

4. Whether Petitioner Lionel Rodrigue was constitutionally entitled to have a trial jury - and not the trial judge - determine whether the police were objectively reasonable in entering his chicken barn the first time under a search warrant for the property of Raymond Rodrigue and the second time under an allegedly involuntary consent by Raymond Rodrigue?

LIST OF PARTIES

Petitioners: Raymond and Lionel Rodrigue

Respondents: Maine State Police Detective
Gerard Madden
District Attorney David Crook
Maine State Police*
State of Maine*

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* Petitioners recognize that the Maine State Police and the State of Maine, two of the parties below, do not qualify as persons under 42 U.S.C. § 1983 and therefore are not parties to this proceeding.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term 1998

RAYMOND RODRIGUE, et al., Petitioner

V.

MAINE STATE POLICE DETECTIVE
GERARD MADDEN, et al., Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF THE STATE OF
MAINE

OPINIONS BELOW

The Memorandum of Decision of the Maine Supreme Judicial Court (App. at 1), and the Maine Superior Court's Order on Maine State Police Defendants' Motion for Partial Summary Judgment (App. at 3) and the Maine Superior Court's Order on District Attorney's Motion for Summary Judgment (App. at 6), are unreported.

JURISDICTION

The Maine Supreme Judicial Court's Memorandum of Decision was entered on May 15, 1998. By letter dated August 3, 1998, and signed by Assistant Clerk Sandra Elliott Spagnolo, Petitioner's Application No. A-102 was granted for extending the time within which to file a petition for a writ of certiorari to and including Monday, October 12, 1998, a legal holiday. By U.S. Sup. Ct. Rule 30.1, since Monday, October 12, 1998, is a federal legal

holiday, the period of time for filing the petition for certiorari is extended until the end of October 13, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the Constitution of the United States:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law....

42 U.S.C. § 1983 in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person

within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On May 20, 1996, Maine State Police Detective Gerard Madden, primary investigator into alleged thefts from the Maine Surplus Property Program, obtained warrants for the search of a number of homes and businesses in the greater Augusta area for property allegedly stolen from the Program. In the course of executing these warrants on that same date, the police kicked Raymond and Lionel Rodrigue out of their dance hall and then, as Raymond and Lionel were driving back to their home only minutes away, other officers broke into their home, causing extensive damage to the door system. See Affidavit of Raymond Rodrigue dated September 25, 1996, and Estimate of Handyman's Touch.

Under the authority of the warrant, which was explicitly for the residence and property of Raymond Rodrigue, the police also searched the entirely separate chicken barn of Lionel Rodrigue. On the following day (May 21, 1996), Raymond Rodrigue went to the District Attorney's Office, the Attorney General's Office, and the Internal Affairs Division of the Maine State Police to protest the entry into Lionel's chicken barn. According to

the affidavit of Raymond Rodrigue dated June 11, 1997, "The State Police responded that even though Lionel was the sole owner of his chicken barn, it was essentially all the same property and that the police violated no law in making an entry into Lionel's chicken barn."

On the next day (May 22, 1996), the police returned to Lionel's chicken barn. Under a coerced consent from Raymond Rodrigue (see affidavit of Raymond Rodrigue dated June 11, 1997), the police entered Lionel's chicken barn and seized approximately 69 Federal Surplus Military Boots, known as Mickey Mouse boots.

Now, almost 2 ½ years later, no criminal charges have been brought against anyone relative to this entire Surplus Property investigation, and there has been no forfeiture action and no proof by a preponderance of the evidence that Respondents are entitled to hold on to the boots.

Petitioners Raymond and Lionel Rodrigue sued Maine State Police Detective Gerard Madden and the other Respondents in April 1997 in Superior Court, Kennebec County, Maine. Petitioners alleged, inter alia, causes of action under 42 U.S.C. § 1983 for violations of the Fourth and Fourteenth Amendments. Respondents filed motions for partial summary judgment and summary judgement. In a Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment, Petitioners specifically stated:

> To the extent that Detective Madden obtained [the] May 20th search warrants on the basis of intentional or reckless falsehoods and misstatements in his affidavit or intentional or

> reckless omissions of material facts from his affidavit, he and any other law enforcement officers who assisted him in this intentional or reckless disregard of the truth can enjoy no absolute or qualified immunity.

Respondents' motions were nevertheless granted by the Maine Superior Court, which stated: "In all of their actions, the State Police engaged in no objectively unreasonable or illegal acts." (App. at 4).

Petitioners appealed to the Maine Supreme Judicial Court, arguing inter alia that "the Franks violation in this case pierces any qualified immunity defenses." Reply Brief of Appellant to Maine Supreme Judicial Court at 3. In a one-paragraph Memorandum of Decision denying Petitioner's appeal, the Maine Supreme Judicial Court stated:

> Contrary to the Rodrigues' arguments, the court did not err by concluding, on the undisputed facts, that neither police not prosecutors acted in an objectively unreasonable manner in applying for or executing the initial search warrant, gaining consent for the second search, and retaining the seized property pending prosecutorial review.

(App. at 1-2).

Petitioners seek review of this judgment.

A. THE FRANKS PROBLEM.

A significant part of the alleged probable cause supporting the warrant for the residence and property of Raymond Rodrigue was information allegedly from Joseph Wenckus. Indeed, the affidavit for the warrant specifically stated that "[y]our affiant... considers it likely that RODRIGUE would keep some of the stolen property at his house, based on WENCKUS's statements as well as the observations of the officers while doing surveillance at the warehouse."

However, in substantial portions of Joseph Wenckus's affidavit dated October 4, 1996, Wenckus states that Detective Madden in Detective Madden's affidavit falsely misrepresented and misconstrued whatever Wenckus told Madden. See particularly paragraphs 2, 5, 6, 7, 8, and 9 of Wenckus's affidavit, App. at 7-12. Hence, Wenckus's affidavit alone raises the very real issue as to whether the police intentionally, or with reckless disregard for the truth, prepared a false affidavit in violation of Franks v. Delaware, 438 U.S. 154 (1978).

Robert Veilleux's affidavit dated July 31, 1997 (App. at 17-29) also raises a Franks issue as to Detective Madden's affidavit. Robert Veilleux's July 31st affidavit states that Ray Rodrigue's presence at the warehouse and whatever property he purchased at the warehouse were totally lawful.

Robert Veilleux made this affidavit based on his position as State Surplus Property Supervisor from 1990 to 1996. In this affidavit, Robert Veilleux goes on to describe the differences between the Federal Surplus Property Program and the State Surplus Property Program and concludes that Ray Rodrigue did nothing illegal and that his

presence and purchases from the Surplus Property Program were totally within the law. The affidavits of Detective Madden and Division of Purchases Director Richard Thompson suggest otherwise, without definitely so stating. Not only do these conflicting affidavits generate genuine issues of material fact (to be decided by a jury, not the trial court), but these conflicting affidavits also call into question whether Detective Madden or District Attorney David Crook were engaged in intentional or reckless omissions or misrepresentations of fact in order to prop up their so-called probable cause - which in turn calls into question their ability to hide behind the shield of qualified immunity.

Robert Veilleux's affidavit dated June 10, 1997 (App. at 13-16), further calls into question whether Respondents intentionally or recklessly omitted material information from Detective Madden's affidavit about Detective Madden's "concerned citizen informant" Marshall "Buzz" Crandall. Information and files in the possession of the State of Maine demonstrated that Buzz Crandall, an employee of the Surplus Property Program, was the target of a 1993 Surplus Property investigation into the unauthorized release to - and receipt by - Buzz Crandall of a Surplus Property Program camper-trailer. No mention of this investigation, which casts doubt on Crandall's credibility, is contained in Madden's affidavit.

To both the Maine Superior Court and the Maine Supreme Judicial Court, Petitioners argued that the qualified immunity defense, which looks at whether government officials have acted in an objectively unreasonable manner, does not apply when the claim is a Franks violation. Petitioners further argued that the

conflicting affidavits required a jury, not the trial court, to determine whether the police committed a Franks violation. Transcript of Hearing on October 7, 1997, at 12-13; Brief of Appellant to Maine Supreme Judicial Court at 24. Yet both courts relied completely on the qualified immunity defense in granting summary judgment on Petitioners' claims. Both courts propped up their rulings by claiming that the material facts were not in dispute.

B. THE MICKEY MOUSE BOOTS.

The police came back to the Rodrigue property on May 22, 1996, searched Lionel's chicken barn, and seized approximately 69 Federal Surplus Military Boots, known as Mickey Mouse boots. In paragraph 19 of his affidavit dated June 11, 1997, Ray Rodrigue states the following:

> 19. Also on page 3 the State would lead one to believe that because I received "69" Federal Surplus military boots of assorted sizes for free that therefore I have no right to them. The fact of the matter remains that those boots belonged to me, they were given to me, the State seized them, and must now carry the burden of proof to demonstrate that the State may legally hold on to these boots. It is my position that the State has seized these boots illegally and continues to hold on to them illegally. This is a disputed issue of fact. Furthermore, it is my understanding that Robert Veilleux was authorized by Dick Thompson to give these boots to me as otherwise the boots would have only been thrown into the dumpster, where the State would have to pay for the boots and other

> similar trash to be hauled off. Rather, by my taking the boots, I was saving the State money by hauling off the trash at no charge to the State.

Ray Rodrigue attempted to get his Mickey Mouse boots back from the State Police but Detective Gerard Madden refused to meet with him. (Memorandum in Opposition to Defendant's Motion for Partial Summary Judgment at 2). In Petitioners' Memorandum in Opposition to Defendant's Motion for Partial Summary Judgment at 6-7, which memorandum is dated June 16, 1997, Petitioners argued that Respondents have no right to retain Ray's Mickey Mouse boots "where there has been no criminal prosecution, no forfeiture action, and the Defendants have failed to demonstrate why - more than a year after the seizure of the Mickey Mouse boots - there is a need to retain them." In a hearing on October 7, 1997, Respondents replied that this case is "still under prosecutorial review" and the boots are "potential evidence in a criminal case." Transcript of Hearing on October 7, 1997, at 13-14. For these reasons, the trial court ruled that Respondents did not have to return the boots. Id. at 17-18.

On appeal to the Maine Supreme Judicial Court, Petitioners argued:

> Plaintiffs also understand that District Attorney David Crook is responsible for the failure by the State to return Ray's Mickey Mouse boots seized from Lionel's chicken barn, which boots Plaintiffs contend cannot constitutionally be retained by the State for an indefinite period of time on just a search warrant. At some point,

> prior to the expiration of the statute of limitations, due process under the State or Federal Constitution must require the State to either return the boots or prevail in a forfeiture action to justify retaining them.

(Brief of Appellant to the Maine Supreme Judicial Court at 22-23). The Maine Supreme Judicial Court stated simply that Respondents did not act "in an objectively unreasonable manner in... retaining the seized property pending prosecutorial review." (App. at 1-2).

Now, in October, 1998, it is almost 2 ½ years since the Mickey Mouse boots were seized on May 22, 1996, and it is more than a year after the hearing on October 7, 1997, when Respondents stated that the case is still under prosecutorial review. Yet no criminal charges have been brought - or even sought - and there has been no forfeiture action, no proof by a preponderance of the evidence that Respondents are entitled to hold on to the boots, and the three-year statute of limitations (17-A M.R.S.A. § 8) for any misdemeanor charges will expire at the latest by the end of May 1999.

C. DISPUTED FACTS AS TO THE SEARCH OF LIONEL'S CHICKEN BARN ON MAY 20, 1996, AND THE VOLUNTARINESS OF RAYMOND RODRIGUE'S CONSENTS ON MAY 22, 1996.

In his affidavit dated June 11, 1997, Raymond Rodrigue stated the following about Lionel's chicken barn:

> 27. One more point about the chicken barn: Lionel receives a separate tax bill

> from the City of Augusta for the chicken barn and its land. Hence, the police could have checked with not only the Kennebec County Registry of Deeds but also the Augusta tax maps to learn that Lionel's chicken barn does not belong in any way to me and was not covered by the search warrant for property belonging to me.

In his affidavit dated June 10, 1997, Lionel Rodrigue expressly stated that "I never gave the police permission to enter my chicken barn, either on May 20, 1996, or May 22, 1996." (Page 2 of Lionel's affidavit dated June 10, 1997).

The disputed nature of the facts as to the search of Lionel's chicken barn on May 20, 1996, and the voluntariness (or lack thereof) of Ray Rodrigue's consents on May 22, 1996, is demonstrated by Ray Rodrigue's affidavit dated June 11, 1997, where Ray states:

> 7. Contrary to the affidavit of Joseph Dziczek dated May 19, 1997, it was a Federal GSA agent- and not me - who said lets go over to the chicken barn and search that.... Moreover, the police through their manner and actions led me to believe that they had a right to enter the barn on the basis of their search warrant. I was concerned that if I had protested the police entrance into the barn that the police would have used force to enter the barn anyway, including handcuffing me, so that I would not interfere with their predetermined course of action. In other words, with all of those officers there, armed with a search warrant, and having already been kicked out of my Crystal Falls

Dance Hall, and had my house broken into, I felt that it was useless to resist or protest the police action on my property, even if it amounted to a trespass onto my property or a trespass into Lionel's chicken barn. Moreover, the Federal officer had said that it would go better for Lionel and me if we fully cooperated, so I cooperated and did not do anything to annoy or irritate the officers.

8. Contrary to the suggestion in Joseph Dziczek's affidavit, I did not voluntarily consent on May 20, 1996, for the police to enter Lionel's chicken barn....

9. However, the next morning, on May 21, 1996, I went to the Kennebec County Courthouse to protest the police entry on to our property and into Lionel's chicken barn the day before on May 20th. I wanted to see District [Attorney] David Crook, but was told that Crook was not in his office, but was told by another gentleman in the District Attorney's office that I should go see the Maine State Police. I felt like this was sending a chicken into a wolf pen... Since no one at the District Attorney's office would talk with me, and since I felt uncomfortable going over to the Maine State Police, I went on May 21, 1996, to the Attorney General's Office to learn if the police had a right to go into the chicken barn.

10. I went to the receptionist for the Attorney General's Office on the sixth floor of

the State Office Building and told her that I was involved in the State Surplus Property case. The receptionist then said that I had to go speak with someone on the seventh floor of the Attorney General's Office. I went up to the seventh floor and spoke with someone of the Attorney General's Office for about 15 minutes and explained that the chicken barn was owned by Lionel and not by me and questioned whether the police had a right to enter the chicken barn. This person then told me that I had better go to the Internal Affairs Division of the Maine State Police in Gardiner.

11. I then went down to Gardiner and made a complaint to the Internal Affairs Division of the Maine State Police. This was also on May 21, 1996. I spoke with two gentlemen from the Maine State Police in Gardiner and complained about the police entry on to our property on May 20th and the police entry into Lionel's chicken barn on May 20th. The State Police responded that even though Lionel was the sole owner of his chicken barn, it was essentially all the same property and that the police violated no law in making an entry into Lionel's chicken barn.

12. On May 22, 1996, the police again came unannounced to my house. When the police got to my house, they told me that they wanted to take a video tape of the house and chicken barn. One of the officers handed me a paper and told me to "sign this." I said what if I don't sign this. The other officer told

me that if I did not sign this, that the officers would find a way into my house and the chicken barn, that they had found a way into the house and the chicken barn two days before, and that they would again find a way into the house and chicken barn whether I gave them permission to go in or not. At this point I felt that the best thing for me to do was to sign this form, so as to avoid any additional damage to the house and chicken barn as they had broken into the house and damaged it two days before. The police told me that the form that they were asking me to sign was to give them permission to enter the house and chicken barn. The police told me it was just a formality. The day before, I had gone to the District Attorney's Office, the Attorney General's Office, and the Internal Affairs Division of the Maine State Police to complain about the entry on to my property and also to complain about the entry into the chicken barn. No one would listen to me. Moreover, on May 20th, the police had literally broken into my home, damaging it. On May 22nd the police said that if I did not sign the form, that they would again find a way to break into the home and also into the chicken barn. I therefore felt, against my will, that I had to sign this permission form so as to avoid the very real prospect that the police would do either further damage to my house or the chicken barn, or arrest me for some reason, or both. I signed the permission form that the police presented to me, but not voluntarily or willingly. Significantly, although the materials presented by the State on behalf of their Motion for Partial Summary

Judgement claim that the May 22nd search was a consent search and claim that the videotape of the May 22nd "consent search" shows this May 22nd search to be a consent search, the videotape starts after I had signed the written permission form. That is, the videotape never shows my coerced "consent." Rather, the videotape begins with an officer stating that they are not going to videotape the consent but will instead rely on my signature on the written consent form. However, my signature on the written consent form does not show anything about my resistance to signing the form on May 22nd and does not show anything about my visits to the District Attorney's Office, the Attorney General's Office, and the Internal Affairs Division of the Maine State Police on May 21st where I protested both the entry into my house and the entry into Lionel's chicken barn.

13. In fact, I ended up signing 3 permission forms on May 22nd: 1) one for the house and barn where the videotape was made on the afternoon of May 22nd, 2) one for Crystal Falls Dance Hall to be searched on May 22nd, and 3) one for the afternoon of May 22nd when a state police officer came back to seize the boots from Lionel's chicken barn. None of these consent forms was signed voluntarily on my part. By the police actions on May 20, 21, and 22, I felt that I had no right to refuse consent.

14. It is curious to me that in all the

materials submitted by the State in behalf of their Motion for Partial Summary Judgement that there are no materials reflecting my visits to the District Attorney's Office, the Attorney General's office and the Maine State Police on May 21st. These materials are important, if they still exist, because they would demonstrate that I protested the entry on to our property on May 20th and the entry into Lionel's chicken barn on May 20th prior to when the police came back to our house on May 22nd. Why is there no mention of my May 21st activity in any of the documentation submitted by the State? What is the State trying to cover up? Does this paperwork even still exist?

REASONS FOR GRANTING THE PETITION

I. THE MAINE SUPREME JUDICIAL COURT'S DECISION AND ANALYSIS CONFLICT WITH THOSE OF THE FEDERAL CIRCUIT COURTS AND PRESENT THE OPPORTUNITY TO CLEARLY SET FORTH THE ANALYSIS FOR DENYING SUMMARY JUDGMENT ON THE BASIS OF QUALIFIED IMMUNITY WHEN THERE IS AN ALLEGATION THAT THE POLICE HAVE VIOLATED CLEARLY ESTABLISHED LAW, SUCH AS A FRANKS VIOLATION.

In ruling that neither police nor prosecutors engaged in any objectively unreasonable acts, both the Maine Supreme Judicial Court and Superior Court wholly ignored and never dealt with Petitioners' argument that the doctrine of qualified immunity cannot shield law enforcement officers from civil liability when they engage in intentional

or reckless misrepresentations of facts in order to prop up probable cause for a search warrant. Petitioners submitted several affidavits, including the affidavit of Joseph Wenckus, to show that law enforcement officers intentionally or recklessly misrepresented the truth to get their search warrant in this case. Although the Supreme Court has suggested that qualified immunity does not apply when the police intentionally or recklessly misrepresent the truth to obtain a warrant,[1] no decision has squarely so held. This case presents that opportunity.

Moreover, the Maine Supreme Judicial Court's simplistic analysis and cursory decision are in conflict with the decisions of, and the analysis used by, federal circuit courts. For example, in the leading case of Olson v. Tyler, 771 F.2d 277, 281-82 (7th Cir. 1985), the Seventh Circuit, relying on Franks v. Delaware, 438 U.S. 154 (1977), and United States v. Leon, 468 U.S. 897 (1984), stated that "[i]f an officer submitted an affidavit that contained statements he knew to be false or would have known were false had he not recklessly disregarded the truth..., he cannot be said to have acted in an objectively reasonable manner" and "that officer would not enjoy good faith immunity for civil

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[1] See Malley v. Briggs, 475 U.S. 335, 344-46 (1986) ("we hold that the same standard of objective reasonableness that we applied in the context of a suppression hearing in Leon, supra, defines the qualified immunity accorded an officer...."); United States v. Leon, 468 U.S. 897, 922-23 (1984) (for good-faith exception to exclusionary rule, officer's reliance on warrant must be objectively reasonable, as it would be under Harlow v. Fitzgerald, 457 U.S. 800, 815-19 (1982), and one circumstance where officer's reliance would not be reasonable is "if the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth. Franks v. Delaware, 438 U.S. 154 (1978)").

damages."

Relying on Olson v. Tyler, Malley v. Briggs, 475 U.S. 335 (1986), and Harlow v. Fitzgerald, 457 U.S. 800 (1982), the Third Circuit stated that government officials "enjoy qualified immunity from civil damages when their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Lippay v. Christos, 996 F.2d 1490, 1503-04 (3rd Cir. 1993). The Third Circuit further stated:

> If a police officer submits an affidavit containing statements he knows to be false or would know are false if he had not recklessly disregarded the truth, the officer obviously failed to observe a right that was clearly established. Thus, he is not entitled to qualified immunity.

Lippay, 996 F.2d at 1504.

Several circuit courts have applied a variously worded and vaguely defined two-part test to determine whether an officer is entitled to summary judgment on the basis of qualified immunity, which essentially boils down to these two considerations: 1) is there an allegation that police conduct violated a clearly established constitutional or statutory right, and 2) has the allegation been substantiated with evidence significantly probative to go beyond mere speculation, conjecture, or fantasy? See, e.g., Moody v. St. Charles County, 23 F.3d 1410 (8th Cir. 1994); Beard v. City of Northglenn, Colorado, 24 F.3d 110 (10th Cir. 1994) (White, J. (retired)); Dawkins v. Graham, 50 F.3d 532 (8th Cir. 1995).

Both parts of this test have been met in this case. First, there is an allegation of a Franks violation, a violation of clearly established constitutional law. Second, the various affidavits filed in the trial court - e.g., Wenckus's affidavit that Detective Madden misrepresented substantial parts of information provided by Wenckus combined with the affidavits of Ray Rodrigue and Robert Veilleux - are significantly probative of the allegation to deny summary judgment and get to the trier of fact, the jury.

Certiorari should be granted in this case so that the test for getting beyond qualified immunity - beyond summary judgment to a jury - when there is an allegation that police have violated a clearly established law, e.g., a Franks violation, can itself be clearly established.

II. LAW ENFORCEMENT'S CONTINUED RETENTION FOR OVER TWO YEARS OF PROPERTY SEIZED UNDER A SEARCH WARRANT, WITHOUT ANY CRIMINAL PROSECUTION OR EVEN FORFEITURE ACTION, VIOLATES DUE PROCESS AND REQUIRES THIS COURT TO SET DUE PROCESS STANDARDS GOVERNING LAW ENFORCEMENT'S RETENTION OF SEIZED PROPERTY.

Although the approximately 69 Mickey Mouse boots seized from Ray Rodrigue out of Lionel's chicken barn are "not absolute necessities of life" (Fuentes v. Shevin, 407 U.S. 67, 88 (1972)) and lack substantial value, they still were property in the possession of Ray Rodrigue. Respondents seized this property almost 2 ½ years ago - and refuse to return it - on the basis of an ex parte showing of alleged probable cause that the boots were taken illegally

from the State Surplus Property Program. However, there was no opportunity for Raymond and Lionel Rodrigue to participate in that probable cause hearing. Nor has there been any legal proceeding - no criminal prosecution, no forfeiture action, nothing - to justify Respondents' continued retention of these boots. Nor, with the exception of this dismissed § 1983 action, have Plaintiffs been able to contest the continued retention of their boots.[2]

Given the absence of any criminal prosecution thus far, which with each passing month belies Respondents' claims that this case is "still under prosecutorial review" and that the boots are "potential evidence in a criminal case," and further given the expiration of the misdemeanor three-year statute of limitations (17-A M.R.S.A. § 8) in about six months, fourteenth amendment due process requires, at least, that Respondents justify continued retention of the Mickey Mouse boots by a preponderance of the evidence in an adversarial proceeding. The heavy-handed law enforcement action in this case, which is no doubt not unique, is simply incompatible with notions of fundamental fairness and due process.

Certiorari should be granted so that this Court can set limits, as required by due process, for law enforcement's continued retention for over two years of seized property when there has been no criminal prosecution or even forfeiture action. See Fuentes v. Shevin, 407 U.S. 67 (1972).

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[2] The motion for return of property allowed under M.R.Crim.41(e) can be brought only for illegal seizures.

III. ONCE AGAIN, THIS CASE PRESENTS THE OPPORTUNITY TO CLEARLY SET FORTH THE ANALYSIS FOR DENYING SUMMARY JUDGMENT ON THE BASIS OF QUALIFIED IMMUNITY WHEN THERE IS AN ALLEGATION THAT THE POLICE HAVE VIOLATED CLEARLY ESTABLISHED LAW, SUCH AS OBTAINING INVOLUNTARY CONSENT.

Detective Madden's affidavit and the search warrant itself were explicitly for "the residence and upon the premises, including but not limited to any and all outbuildings belonging to the property... of Raymond Rodrigue," not Lionel's chicken barn. The sole reference to the chicken barn was as description of the place to be searched: "Said residence and premises being more fully described as a yellow and gren [sic] ranch-style house with a detached two car garage with a large chicken barn behind the garage...."

However, the chicken barn belongs to Lionel, not Raymond Rodrigue. Although the Maine Supreme Judicial Court concluded that "neither police nor prosecutors acted in an objectively unreasonable manner in applying for or executing the initial search warrant" into Lionel's chicken barn (App. at 1-2), this decision and analysis conflict with Dawkins v. Graham, 50 F.3d 532 (8th Cir. 1995).

In Dawkins, the Eighth Circuit employed a two-part analysis. First, did the police allegedly violate a clearly established right? Yes, said the Eighth Circuit, relying on Maryland v. Garrison, 480 U.S. 79 (1987), because "[t]he more specific right not to be subjected to the unreasonable mistaken execution of a valid search warrant was... clearly established at the time of the search in this case." Second,

is there a material question of fact about whether the officers' entry into the wrong home was objectively unreasonable? Yes, said the Eighth Circuit, so that denial of summary judgment was appropriate. Dawkins, 50 F.3d at 535.

This same two-part analysis should have been employed by the Maine Supreme Judicial Court in this case. First, Petitioner Lionel Rodrigue alleged police violation of a clearly established constitutional right, i.e., entry into the wrong place purportedly under a warrant. Second, notwithstanding the Maine Supreme Court's claim that the facts were undisputed,[3] Ray Rodrigue's affidavit dated June 11, 1997, disputes the police claim that Ray suggested the search of Lionel's chicken barn and that Ray gave to the police the impression that the barn belonged to him.

This same two-part analysis also should have been employed with regard to the police search and seizure on May 22, 1996. First, is there an allegation that the police violated a clearly established constitutional right? Yes, because it is clearly established that an involuntary consent violates the Fourth Amendment. Second, are there material questions of fact as to whether Ray gave voluntary consents on May 22, 1996, when the police returned to search

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[3]This Court owes no deference to this finding by the Maine Courts as the Maine Courts applied the wrong legal standard by failing to address whether the police had violated clearly established constitutional rights, thus piercing qualified immunity's objectively reasonable analysis, and calling into question whether the material facts would be deemed disputed under the correct legal analysis.

Lionel's chicken barn and the premises? Yes, see Ray Rodrigue's affidavit dated June 11, 1997, especially paragraphs 9-12, where Ray discusses his visits on May 21, 1996 to the District Attorney's Office, Attorney General's Office, and Maine State Police to protest the May 20th search, and further see paragraph 11 where Ray gives the Maine State Police notice that the chicken barn belongs to Lionel only and not Ray. See Ruggiero v. Krzeminski, 928 F.2d 558 (2d Cir. 1991).

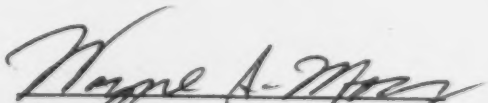
Furthermore, the fact that the May 22nd searches were done without a warrant makes them presumptively unreasonable for purposes of qualilfied immunity, since only searches with a warrant are reasonable per se. See Ruggiero, 928 F.2d at 563.

Certiorari should be granted because, once again, this case presents the opportunity to clearly set forth the analysis for denying summary judgment on the basis of qualified immunity when there is an allegation that the police have violated clearly established law, such as obtaining an involuntary consent.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



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Counsel of Record for Petitioner

October 13, 1998

APPENDIX

MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. Mem 98-79
Docket No. Ken-97-651

RAYMOND RODRIGUE *et al.*

v.

GERARD MADDEN *et al.*

Argued May 6, 1998
Decided May 15, 1998
Date of Entry May 15, 1998

Panel: WATHEN, C.J., and ROBERTS, CLIFFORD, RUDMAN, DANA, and SAUFLEY, JJ.

MEMORANDUM OF DECISION

Plaintiffs Raymond and Lionel Rodrigue appeal from a summary judgment entered in the Superior Court (Kennebec County, *Alexander, J.*) In favor of defendants State of Maine, Maine State Police, State Police Detective Gerard Madden, and Kennebec County District Attorney David Crook on the Rodrigues' seventeen-count complaint alleging trespass, conversion, and state and federal constitutional violations arising from search and seizure activity conducted by police on their property. Contrary to the Rodrigues' arguments, the court did not err by concluding, on the undisputed facts, that neither police nor prosecutors acted in an objectively unreasonable manner in

applying for or executing the initial search warrant, gaining consent for the second search, and retaining the seized property pending prosecutorial review. Therefore, the plaintiffs' tort claims and claims under the state and federal constitutions fail. *See* Me. Const. Art. I, § 5; U.S. Const. Amend. IV; 42 U.S.C.A. § 1983 (1994).

The entry is:
Judgment affirmed.

Attorney for plaintiff:

Wayne S. Moss, Esq., (orally)
P.O. Box 2207
Augusta, ME 04338

Attorneys for defendants:

Andrew Ketterer, Attorney General
Leanne Robbin, Asst.. Atty. Gen.
6 State House Station
Augusta, ME 04333-0006

STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO.
CV-97-084
Date of Entry October 8, 1997

RAYMOND RODRIGUE, *et al.*,
Plaintiffs

v.

MAINE STATE POLICE, *et al.*,
Defendants

ORDER ON MAINE STATE POLICE DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

After hearing on the Motion for Partial Summary Judgment submitted on behalf of the State of Maine, Maine State Police and Detective Gerard Madden, the court determines that the following facts are not in dispute:

From approximately March, 1995 to July, 1996, investigators from the United States General Services Administration and the Maine State Police investigated allegations that employees of the State Surplus Property Program were misappropriating federal and state surplus property for personal gain. On May 20, 1996, the investigators applied for search warrants to search the residences of current and former employees of the State Surplus Property Program, and other persons who had acquired state surplus property.

Investigators had probable cause to believe that

Raymond Rodrigue, an individual who frequented the State Surplus Warehouse, was storing surplus property that he may have not been entitled to at his business, Crystal Falls in Chelsea, as well as his residence and associated outbuildings located at 2750 Cony Street in Augusta.

When investigators arrived at Raymond Rodrigue's home in order to execute the search warrant on May 20, 1996, neither Raymond Rodrigue nor his brother Lionel were at home. For this reason, the investigators used a crow bar to pry open the front door of the residence in order to conduct the search. Raymond and Lionel Rodrigue arrived shortly after the investigators gained entrance to their home. Raymond Rodrigue suggested that investigators search the associated chicken barn and provided a means of access to that facility. As the video submitted in support of the Motion for Partial Summary Judgment demonstrates, Raymond Rodrigue occupied much of the chicken barn through storage of state and federal surplus property which he had purchased from, or had been given by, employees of the State Surplus Property Program.

In all of their actions, the State Police engaged in no objectively unreasonable or illegal acts.

Based on these determinations, the court ORDERS:

1. The Maine State Police Defendants' Motion for Partial Summary Judgment is GRANTED.

2. Judgment for these defendants that:

A. The complaint is dismissed with respect to the State of Maine and the Maine State Police on the grounds of absolute immunity under the Maine Tort Claims Act and on the grounds that neither the State nor a state agency may be

sued under the State or Federal Civil Rights Act.

B. All claims with respect to Detective Gerard Madden are dismissed, except with respect to the claim for the damage to the door to the Rodrigues' residence.

C. The court denies the Motion for Partial Summary Judgment with respect to the damage to the door, but any future proceedings on this issue shall be limited to whether the damage to the door was reasonable and what the value of the damage to the door was.

Dated: October 8, 1997

s/ Donald G. Alexander
Donald G. Alexander
Justice, Superior Court

STATE OF MAINE
KENNEBEC, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-97-084
Date of Entry October 8, 1997

RAYMOND RODRIGUE, *et al.*,
Plaintiffs

v.

MAINE STATE POLICE, *et al.*,
Defendants

ORDER ON DISTRICT ATTORNEY'S MOTION FOR SUMMARY JUDGMENT

Upon hearing on the Motion for Summary Judgment submitted on behalf of the District Attorney, and based on the discussion on the record, the court ORDERS:

1. Motion for Summary Judgment GRANTED.

2. Judgment for the District Attorney that plaintiffs are not entitled to relief against that office.

Dated; October 8, 1997

s/ Donald G. Alexander
Donald G. Alexander
Justice, Superior Court

AFFIDAVIT OF JOSEPH A. WENCKUS

I, Joseph A. Wenckus, of 431 Townhouse Rd., Whitefield, Maine 04353, telephone number (207) 549-5950, do hereby state the following:

1. The affidavit and request for a search warrant dated May 20, 1996, against Arthur Martin suggests that Arthur and I were involved in a kick-back scheme where Arthur would give me daily items from the State's Surplus Property program and that I would then sell these items for Arthur to various places and then turnover the check to Arthur so that Arthur could take for his personal gain his share of the proceeds from the illegal theft and sale of the State's Surplus Property. In other words, the allegation is in the affidavit against Arthur Martin that I was selling stolen items from Surplus Property for Arthur Martin on a consignment basis, so that Arthur was selling me these stolen items from Surplus Property for a specific price, that I would then sell these items to various stores, that I would then pay back Arthur the purchase price that he charged me, and that I would keep any of the proceeds above the purchase price. I, without qualification, deny that I was involved in any kind of a pay-back scheme with Arthur Martin where I would sell stolen items on consignment for Arthur and then pay him back a purchase price or any money for the sale of those items. Any of the material that I received from Surplus Property was designated as trash, which would have gone into the dumpster if I had not taken it. I was not taking stolen items, and I was not selling for Arthur Martin any junk that I did receive from Surplus Property.

2. In paragraph 10 of the affidavit against Arthur

Martin, Maine State Police Detective Gerry Madden concludes that five checks from Sandy River Surplus to me "were endorsed by WENCKUS and then given to MARTIN as payment for the stolen Surplus items." This is a false conclusion by Detective Madden. The real fact is that I do not have a checking account, savings account, or any bank account. Thus, when Sandy River Surplus gave me checks for items that I sold to them, I had no ready way of cashing these checks. Arthur Martin and I have known each other well since approximately the sixth grade. I therefore trusted Arthur to cash for me these five checks referred to in paragraph ten. Arthur in fact did cash these five checks for me. That is why these checks are endorsed by me and then given to Arthur. Arthur would then cash these checks and then give me the value of these checks. Contrary to the allegation in paragraph 10 of the affidavit, I did not give these checks to Arthur Martin as payment for the stolen Surplus items. Moreover, I also had other people cash checks for me besides Arthur Martin. My brother Peter Wenckus cashed checks for me. My brother-in-law Steven Merrill also cashed checks for me. My friend John Dupont cashed checks for me because I do not have a bank account, and I trusted all of these people, including Arthur Martin, to cash checks for me and give to me the total value of the checks. This in fact is what happened. I was not selling stolen Surplus property for anyone.

3. In paragraph 12 of the affidavit, it needs to be clarified that the items I received from Arthur Martin from the State's Agency for Surplus Property were junk. These were not stolen items, and I was not selling these items for Arthur Martin.

4. In paragraph 13, it is true that I know that I am

not an eligible donee for Surplus Property. However, I was not receiving Surplus Property of any value, but I was receiving junk, and I thought and still think that it was perfectly legal for me to be receiving this rubbish and then re-selling to people who understand the salvage business. The items I received from Surplus Property were not lined-item inventory property. I know that lined-item inventory property is not junk, has value, and that I was ineligible to receive lined-item inventory property. However, the items I received were junk, were not lined-item inventory property, and had not been falsely labeled as junk. Indeed, a lot of the items that I received from Arthur Martin, I put in a Goodwill dumpster in Gardiner, because I knew this stuff had no value. I have no recollection of the statement attributed to Arthur Martin, in paragraph 13, where Arthur allegedly told me that he was the one stealing Surplus property. Arthur was not stealing any Surplus property and I have no recollection of Arthur saying anything like this to me.

5. The allegations in paragraph 14 of the affidavit are simply wrong. I never stated any such thing. I never fell into debt with Arthur Martin, because Arthur was never charging me a fixed price as his share for my sale of these items. Paragraph 14 is just a complete misunderstanding of whatever I told the police.

6. The allegation in paragraph 15 that I owe Arthur $300 for Surplus property is false. I do not know how the police construed anything I told them to mean that. The allegations in paragraph 15 are false, I never told the police any such things, and whatever the police have put in paragraph 15 is a large departure and misunderstanding and misinterpretation of whatever I told them.

7. The allegations in paragraph 16 as to any kind of underhanded relationship between Arthur and me are also false, and I never told the police any such things. I do not remember exactly what I did tell the police. To the extent that the police have construed whatever I told them to mean what the police have stated in paragraph 16, such interpretation is completely and totally wrong.

8. I have no recollection of the telephone conversation with Kathleen Capobianco described in paragraph 18. I also did not believe and do not now believe that Arthur was storing stolen Surplus property at his home or anywhere else or that Arthur was taking stolen Surplus property. I therefore deny that I told Kathleen Capobianco that Arthur was dealing in stolen Surplus property or had stolen Surplus property anywhere. The recorded telephone conversation between Arthur Martin and myself, as reported in paragraph 19 of the affidavit, completely misconstrues the whole substance of that conversation. As Agent Kathleen Capobianco stated in one of her reports, there is nothing in my telephone conversation with Arthur Martin that would support the conclusion that I was selling stolen Surplus property for Arthur on consignment. The report of the recorded telephone conversation between myself and Arthur Martin, as contained in paragraph 19 of the affidavit, is a very different understanding of that conversation from what I understood it to be. The police have basically taken whatever Arthur and I discussed and then construed it for their own ends to try to make a case that Arthur was dealing in stolen Surplus property and that Arthur and I were discussing various aspects of that; however, Arthur and I were discussing no such thing. Contrary to the allegations in paragraph 20 of the affidavit, Arthur never called me to come to the warehouse, rather I called Arthur. Moreover, I

would stop by the warehouse at all times of the day, especially in the morning, and did not confine my stops to the warehouse during lunchtime. All of the allegations in paragraph 20 are simply an effort to take whatever I did out of context and piece it together for the benefit of the police interpretation that Arthur and I were involved in illegal activity. The allegations in paragraph 20 that "Wenckus stated that the property was in good or new condition," is false. The property that I received, although useable or sellable in the salvage business industry, was classified as junk by Surplus property, and I understood that it was junk and was not lined-item inventory, and did not qualify as lined-item inventory. Therefore, I thought that the items that I was receiving from Arthur Martin and from Surplus property were legitimately given to me as legitimately classified junk. I have no recollection about seeing 20 Panasonic telephones at Arthur's house, no recollection about saying that any such telephones were stolen from the Surplus warehouse, and no such recollection about these telephones, so that as to any of the statements attributed to me in paragraph 20 about these telephones, I simply have no recollection. I have no recollection of Arthur ever saying that he was going to blame me for any theft from the Surplus warehouse, because what did Arthur have to blame me for? He had nothing to blame me for, so I have no recollection of him saying that he was going to blame me for anything. I believe that whatever conversation I had with the police has been twisted around by the police for their own purposes to say whatever they want the conversation to say.

9. I believe that Arthur has been singled out in this investigation unfairly and without foundation in the evidence, especially given the misconstructions and

misunderstandings that the police have attributed to anything that I have told them, and that Arthur is being made the scapegoat for this investigation.

Dated: 10/04/96

s/ Joseph A. Wenckus
Joseph A. Wenckus

STATE OF MAINE
KENNEBEC, ss.

Subscribed to and sworn before me this 4th day of October, A.D. 1996.

s/ Wayne S. Moss
Wayne S. Moss, Esq.
Attorney at Law
Admitted to the
Maine Bar:
December 22, 1977

AFFIDAVIT OF ROBERT VEILLEUX

I, Robert Veilleux, do hereby state the following:

1. In paragraph 35 of Detective Madden's affidavit, the Affiant, Maine State Police Detective Gerard Madden, states that he believes "the statements of ROLLINS and CRANDALL are truthful and reliable. Neither have anything to gain by reporting the theft activities of VEILLEUX, neither are currently under investigation, nor do they believe that they are, and neither expects any reward of any sort for giving this information. Both Rollins and Crandall fall into the 'concerned citizen informant' category." This statement, however, omits any mention of the fact that Marshall "Buzz" Crandall was the subject of an investigation in 1993 as to the unauthorized release of a camper trailer to Buzz Crandall, that I was one of the persons who cooperated with appropriate authorities to bring this unauthorized release of the camper-trailer to light, and that I also participated in the recovery of this camper-trailer back to the State from Buzz Crandall. Hence, Detective Madden's affidavit omits any mention of the fact that Buzz Crandall was involved in irregularities in the Surplus Property Program and that Buzz Crandall would have a reason to bear a grudge against me. Enclosed please find documentation as to the investigation of Buzz Crandall's unauthorized receipt of the camper-trailer, along with changes in procedure in the Surplus Property Program as a result of Buzz Crandall's unauthorized receipt of the camper-trailer. Detective Madden's affidavit also fails to mention that Debbie Rollins bore a grudge against me, because I had, on at least one occasion, sat Debbie Rollins down and explained to her that I was not pleased with her job performance.

2. In paragraph 55 of the affidavit, it states that "VEILLEUX sells surplus property indiscriminately to unauthorized person[s],...."This statement ignores the distinction between the Federal and State Surplus Property Program. It is true that with the Federal Surplus Property Program, property may only be sold to authorized donees. However, in the State Surplus Property Program, any individual can purchase the property from the program and is authorized to do so. Hence, the frequent allegation, throughout the affidavit, that I, Robert Veilleux, was selling computers and other State surplus property to unauthorized persons is totally inaccurate and wrong, as any individuals are able to purchase State surplus property from the State Surplus Property Program following the State Surplus Property guidelines, and there is no allegation that the State Surplus Property guidelines were no followed, Moreover, the affidavit fails to mention that Debbie Rollins had worked in the Surplus Property Program only a little over 1 year at the time of Detective Madden's affidavit, and did not fully understand how the program operated, It was also a serious omission on the part of the Affiant to allege that I was involved in the illegal disposition of property to unauthorized persons without first interviewing those people who could have told the Affiant how the program actually worked, such as the predecessor in my job as supervisor of the Surplus Property Program, i.e., David Patterson or the retired manager of warehouse operations named James Gilson. These individuals could have confirmed that the manner in which I conducted the Surplus Property Program, including the disposition of property to persons such as Raymond Rodrigue and Robert Hathaway, was completely consistent with the way the program had operated since its inception. These individuals could have also confirmed that my decisions regarding the disposition

of property were completely consistent with my job description, a copy of which is attached to this document.

3. Although there are allegations in the affidavit in paragraph 30 by Debbie Rollins that I was involved in cash transactions of Surplus Property leaving no paperwork behind, these allegations omit any mention of the monthly reports where I reported all money that I had received. These allegations also omit any reference to the fact that all money received by me ultimately did have an invoice prepared to go with that money, which was turned in once or twice a month to Administrative and Financial Services. Unfortunately, however, since the affidavit fails to mention that Debbie Rollins had only worked in the Surplus Property Program for about 1 year, the Affiant also fails to comment on her unfamiliarity with the operation of the program and also the bookkeeping procedures employed by me, which bookkeeping procedures did account for all money received by me. Furthermore, although the affidavit includes a number of allegations by Debbie Rollins where she sees me accept money from various individuals, nowhere does Debbie Rollins allege that she actually saw me actually take the money without turning it over to Administrative and Financial Services. The paperwork showing my disposition of the money I received was all in my office and it was a huge omission on the part of the law enforcement investigation - as well as on the part of Debbie Rollins - not to be able to find this paperwork. Had they found it, it would have shown that I properly disposed of all money that I received from various individuals.

4. The affidavit also fails to make any mention - a large omission - that it was I who over the past several years had made numerous complaints about irregularities or illegalities in the Surplus Property Program to Brian

McMaster of the Attorney General's Office, Chief Donald Suiter of Capitol Security, Kathleen Capobianco of the Office of Inspector General of the General Services Administration, and Lieutenant David Blake of the Maine State Police, and also Conrad McNaughton of the Maine State Police.

These omissions are serious enough to call into question whether the police either intentionally or with reckless disregard for the truth made these omissions to establish "probable cause" in the affidavit. In view of these omissions, one has to wonder about the credibility of Marshall Crandall and Debbie Rollins on whom Detective Madden's affidavit so seriously relies. Had these omissions been presented to the District Court Judge who issued the search warrants, the District Court Judge would not have been able to find probable cause in the affidavit.

Dated: 6/10/97

s/ Robert J. Veilleux
Robert J. Veilleux
18 Monroe St.
Augusta, ME 04330

Affidavit of Robert Veilleux

I, Robert Veilleux, do hereby state the following:

1. I was the State Surplus Property Supervisor from 1990 to 1996.

2. I am familiar with the rules and operating procedure for both the State and Federal Surplus Property Programs. In my capacity as State Surplus Property Supervisor, I was responsible for and accountable for the operation of the State and Federal Surplus Property Programs. I reported to Richard Thompson, Director of the Bureau of Purchases, and kept Richard Thompson informed of the operations of the State Surplus Property Program and the Federal Surplus Property Program. In addition, I made sure that reports were sent as required to the Federal General Services Administration regional headquarters in Boston, Massachusetts.

3. I have read the Defendants' Reply to Plaintiffs' Memorandum in Opposition to Defendants' Motion for Partial Summary Judgement dated June 23, 1997, and prepared by Assistant Attorney General Leanne Robbin. There are various statements in this Reply that show a fundamental misunderstanding of the differences between the State Surplus Property Program and the Federal Surplus Property Program, which differences need to be set straight, and which differences Richard Thompson should be aware of .

4. For example, in paragraph four on page five of the Reply, there is the statement that Ray Rodrigue "admitted that he paid for batch lots of computers, which he took for

his personal benefit, not for the Town of Jackson." It needs to be clarified, however, that these computers were not Federal property, but were State property which were being discarded as junk. In other words, these batch lots of computers had been sent over to State Surplus by State Agencies which were discarding them, and these batch lots had also been offered to Maine School Districts, which did not want them, and had further been offered to Logical Solutions (a company for fixing computers), which also did not want them. Therefore, these computers were worthless and had been designated as junk. The State Surplus Property Program would have had to pay a trash hauler to take these computers away. Rather than have the State pay to have these worthless computers hauled away, I, as State Surplus Property Program Supervisor, was selling these essentially worthless computers to Ray Rodrigue for very small amounts of money, such as fifteen dollars or twenty dollars per batch lot, so as to make a little money for the State and so as to avoid the expense of having to pay trash haulers to take away the computers which were being discarded by State Agencies and were being rejected by Maine School Districts and by even a computer repair place like Logical Solutions. Defendants in this case would like to draw an incriminating inference from the fact that Ray Rodrigue was purchasing these batch lots of computers not for the Town of Jackson and not as a Federal Screener. However, there is no incriminating inference that can be rationally drawn, as these were State computers so that Ray's status as a Federal Screener for the Town of Jackson has no relationship to his legitimate and entirely separate presence at the State Surplus Property Warehouse to purchase State "junk" computers, which other people could have purchased as well. Indeed, I had permission from Richard Thompson to sell these State "junk" computers,

desks, and typewriters, because we had an over-abundance of these items in the Surplus Property Warehouse and needed to get rid of them and because the computers and typewriters were obsolete and needed to be gotten rid of because no one wanted them. Ray was doing the State a service by paying small amounts of money to pick up these batch lots of computers and haul them away so that the State did not have to pay a trash hauler to take them away. Hence, the allegation in paragraph six on page five that "Ray Rodrigue had no right to purchase surplus directly from the warehouse other than in his role as a Screener for the Town of Jackson" is entirely incorrect. Federal and State guidelines for the disposition of Surplus Property are completely different. So Ray had every right to be at the Surplus Property Warehouse to buy batch lots of State computers in the manner in which he did. Richard Thompson, Director of the Bureau of Purchases, was aware of Ray's purchases of State computers and had approved these purchases by Ray. Hence, contrary to the assertion by Assistant Attorney General Leanne Robbin, Ray Rodrigue had every right to be at the warehouse, other than in his role as a Screener for the Town of Jackson, in order to purchase these batch lots of State "junk" computers and haul them away at no charge to the State. Because of this procedure for the disposition of State "junk" computers, which was known to and authorized by Richard Thompson, Director of the Bureau of Purchases, there was nothing wrong - and Defendants should have known that there was nothing wrong - with Ray receiving State computers and not turning them over to the Town of Jackson. Furthermore, the Mickey Mouse boots had been designated as junk, were not to be distributed to anyone, and therefore it was entirely legitimate for Ray to take these Mickey Mouse boots off the hands of the Surplus Property Program at no charge to the

State. Moreover, Ray Rodrigue was not using the name of the Town of Jackson to obtain the Mickey Mouse boots, but was obtaining them under his own name. There was nothing devious, deceptive, or illegal about Ray's acquisition of the Mickey Mouse boots.

5. The generator was legally bought by Ray for the Town of Jackson, with the understanding that the Town would later put the generator to good use. Moreover, the generator was paid for by the Town of Jackson, contrary to any assertion by Detective Madden, which assertion by Detective Madden is untrue. The so-called generator included only the housing and the diesel engine, but was missing the generator part itself. That's why this piece of equipment was valueless and no good. Moreover, there is nothing about the generator in any affidavits for any search warrants in this case, so that attempts by Defendants to buttress their claim of probable cause with allegations about the generator constitute after-the-fact bootstrapping of evidence in an impermissible effort to establish probable cause, which after-the-fact bootstrapping is directly contrary to the Fourth Amendment.

6. Furthermore, the forklift was also never mentioned in any of the affidavits for the search warrants so that I do not understand how Defendants can use this after-the-fact bootstrapping of evidence to try to establish probable cause now. Moreover, the forklift was given to the Town of Jackson at no charge to be used for parts only. The forklift had a dead battery, which was so dead that it could not even be recharged - in other words, it was deader than dead. It wold have been prohibitably expensive to buy another battery for this forklift to make the forklift operational. Hence, the forklift was good for parts only. Although

Defendants make much of the fact that Ray had the forklift in Lionel's chicken barn, it is important to know that Ray never took any parts from the forklift, and that Ray was storing the forklift solely for the Town of Jackson. The forklift and the generator were being stored in Lionel's chicken barn with the full knowledge of the Town of Jackson Volunteer Fire Department, and with the specific knowledge of Donald Nickerson, Chief of the Jackson Volunteer Fire Department.

7. Furthermore, although Defendants state in paragraph six on page six of the Reply that "lack of documentation was one factor supporting the officers conclusion that State and Federal property was being misappropriated," it is important to note that there was documentation on the forklift and the generator and that this documentation showed that it was being picked up by Ray for the Town of Jackson and that the Town of Jackson provided a check as payment for the generator, with the forklift being picked up at no charge. As for the batch lots of computers which were junk, there was paperwork as to batch lots of State "junk" computers. In other words, Ray would give me a check or cash for these batch lots of computers, and I would make a record of the receipt of the money, which record was kept in my files and a copy of which was sent with the check or cash to Financial Services in the Department of Administration. I simply cannot understand why the Defendants, who are in possession of all of the paperwork and all of the guidelines and knowledge about the operation of the Federal and State Surplus Property Programs, persist in misunderstanding how their own programs work and then blame others, such as Ray Rodrigue, and do damage to others, such as Ray Rodrigue, based on Defendants' own misunderstanding of how the Surplus Property Programs

work. I wonder how the Defendants would like it if they made a bunch of statements, which I then deliberately misconstrued, and then got a search warrant to break into their homes. I bet they would not like it. The Defendants seem to believe a partial set of facts or the partial truth about this case in order to accomplish some objectives known but to them, but as a result there are questions raised as to whether the Defendants proceeded with these search warrants - and proceed now in handling this case - with either an intentional or reckless disregard of the truth.

8. I note that Detective Madden has an affidavit dated June 22, 1997, which includes a number of checks and receipts concerning Joe Wenckus and Arthur Martin. I do not understand why this information has been included by Leanne Robbin, as this information about Arthur Martin and Joe Wenckus has nothing to do with an affidavit for the search of premises of Ray and Lionel Rodrigue. Moreover, I know that in Detective Madden's affidavit he says that he gained his information from first-hand interviews with individuals and then Madden only mentions Joe Wenckus. Were there first-hand interviews with other individuals as well, including Marshall Crandall and Debbie Rollins, and would Marshall Crandall and Debbie Rollins support Detective Madden's version of what they allegedly told Detective Madden or would they say that Detective Madden colored or distorted their statements to Detective Madden's own purposes?

9. In paragraph nine on pages six and seven of the Reply, the incriminating inferences drawn by Assistant Attorney General Leanne Robbin are simply not in accord with the wholly legitimate activities that were going on at the Surplus Property Warehouse. There is nothing

incriminating, contrary to the suggestion of Leanne Robbin, with Ray receiving the computers or even the Mickey Mouse boots and camouflage patchwork other than as a Donee for the Town of Jackson, as the computers were State junk and the Mickey Mouse boots and the camouflage patchwork were Federal junk, so that there was no illegality in Ray receiving this junk to haul it away.

10. Although Leanne Robbin tries to belittle Ray Rodrigue for stating that the Mickey Mouse boots are junk and yet wanting them returned (paragraph five on page five of the Reply), I believe that Leanne Robbin misunderstands the Constitution insofar as the police are not allowed to seize Ray's property, junk or not, without a search warrant and without probable cause. Ray is allowed to stand on principle, and if the Defendants would only be sensitive to this principle and to the rights of Ray and Lionel, this lawsuit would never have been brought.

11. Moreover, I have read Defendant Crandall's answer to the complaint in this case. It is curious to me that Marshall Crandall says in paragraph nine of his answer that "Crandall denies that he made the statements averred in paragraph fifty-five to detective Gerard Madden or to any other Defendant and denies that any statement of his was published in detective Madden's affidavit...." What does this mean? Does this mean that Detective Madden twisted around Marshall Crandall's statements for Detective Madden's own uses but in such a way that Detective Madden distorted beyond recognition what Marshall Crandall had actually told Detective Madden?

12. Contrary to the assertion in paragraph four on page five of the Reply, Ray Rodrigue was authorized to be at the

State Surplus Property Warehouse as more than just a Screener for the Town of Jackson, but also to haul off junk. Richard Thompson knew that Ray was at the Surplus Property Warehouse to perform that action.

13. Detective Madden states in paragraph twenty-six of his affidavit, which is attached to the complaint in this case, that "neither Hathaway or Rodrigue have any business whatsoever at the Warehouse, and that there [sic] presence there only means that they are involved in the thefts described above." This statement by Detective Madden constitutes an intentional or reckless disregard of the truth. Detective Madden could have talked with me or other knowledgeable people at the Warehouse to have learned that Ray Rodrigue had a legitimate presence at the Warehouse other than as a Federal Screener for the Town of Jackson. It seems to me that Detective Madden was totally reckless in failing to ask even the Supervisor of the program (me), let alone any one else as to why Ray Rodrigue and Bob Hathaway were at the Surplus Property Warehouse. Moreover, it seems to me that it was totally reckless for Detective Madden to rely on the word of Marshall Crandall alone, a man who I now understand to have been dismissed from State Service for his own wrongdoing inside the Surplus Property Program. Like Ray Rodrigue, Bob Hathaway had a totally legitimate presence at the Surplus Property Warehouse to haul away junk, which he had purchased from the State, and which no one else wanted. Detective Madden's conclusions about theft are unwarranted. Given Marshall Crandall's answer that Detective Madden may have twisted Crandall's statements to Madden, I have to wonder about the legitimacy of Detective Madden's conclusion that "neither Hathaway or Rodrigue have any business whatsoever at the Warehouse,

and that there [sic] presence there only means that they are involved in the thefts described above."

14. In paragraph twenty-five of Detective Madden's affidavit, there is a statement, attributed to Debbie Rollins, about a $108,000.00 shortfall for the month of April, 1996 in the Surplus Property Program. Given Marshall Crandall's denials that he never told Detective Madden what Detective Madden says that Marshall Crandall told him, I have to wonder whether Detective Madden has accurately reported what Debbie Rollins told him. Furthermore, there was no $108,000.00 shortfall for the month of April, 1996 in the Surplus Property Program. Any check of the records would have shown that. Indeed, it is my understanding that any shortfall alleged by Debbie Rollins was not because there was a shortfall, but because Debbie Rollins was so inexperienced in bookkeeping that she misread the books to state that there was a $108,000.00 shortfall, where there was none. This was later confirmed by Richard Thompson that the $108,000 alleged shortfall was a bookkeeping error, and that the $108,000 figure was grossly exaggerated. How come there are so many errors in this State Police Investigation? I always viewed and have traditionally viewed the police in our State, especially the Maine State Police, to be conscientious and thoroughgoing and accurate in their work and in their attention to detail. Yet this investigation, and the affidavit by Madden, and even the paperwork submitted by the Attorney General's office in behalf of the Defendants in this case, appear to be riddled with misstatements, misunderstandings, and a simple disregard for the facts and truth about this case and the rights of those who have been improperly injured by this State Police Investigation.

15. Why do the Defendants continue to deny that they have violated the Plaintiffs' rights? Why do Defendants refuse to even acknowledge that they made a number of mistakes in obtaining the search warrants in this case, and that they trespassed into the chicken barn of Lionel Rodrigue and onto the property of Lionel and Ray Rodrigue? Why do Defendants persist in stating that the law of trespass somehow has nothing to do with this case? The law of trespass applies to everybody. That law is why we have the "Common Law" - a law common to everybody - in this country.

16. Defendants seem to treat Plaintiffs' lawsuit as a joke. It seems to me that the whole purpose of this lawsuit is to hold accountable those who can do no better than to treat this lawsuit as a joke.

17. It is further my opinion, based on the known and documented facts, that Detective Gerard Madden acted maliciously, recklessly, and had a complete disregard for the truth throughout the Surplus Property investigation and failed to perform his duties in their entirety and professionally, causing a disservice to the taxpayers of the State of Maine and harm to the innocent parties, to wit:

A. In the search warrant for my home and camp, the warrant stated to search any vehicles present on the premises at the time of the execution of the warrant. My truck was at Tobey's Garage in Pittston, Maine, some 14 miles away from my home. Some four or five days after the execution of the warrant on my home and camp, Detective Madden opted to disregard the context of the warrant and went to seize a State Police mobile radio out of my truck

without my knowledge. I was never given a receipt by the State Police, however, Detective Madden was told by Mark Poole, Supervisor of the State Police Radio Repair that this was a State Police radio on loan to me and not stolen from the State. Mr. Poole installed and calibrated this radio for me to use at the Public Auction. This radio was never returned to me. Mr. Dwain Tobey, owner of Tobey's Garage and full time mechanic at the State Police Garage, called me to tell me that my radio had been seized and taken out of my truck.

B. During the course of the investigation I discovered that Mr. Marshall Crandall, Screener for Federal Surplus Property, had sold two Federal camper/trailers to private individuals for $700.00 cash and $300.00 worth of mechanical work on his snowmobile. This money was never turned over to the State. Federal property can never be sold to private individuals. My discovery was reported to Detective Madden along with a signed and notarized affidavit; however Detective Madden was negligent in investigating this matter because Marshall Crandall was one of his informants providing him information about the happenings of the Surplus Program. The matter was never investigated by Detective Madden but I turned over the information and documents to Brian MacMaster of the Investigation Division of the Attorney General's office. It was then properly investigated and subsequently Mr. Crandall was dismissed from State Service.

C. Detective Madden took the statements of Debbie

Rollins, Clerk in the Surplus Program, as gospel truth with no attempt to corroborate these statements. I provided Detective Madden with a list of names of persons who had worked in the Surplus Program who were familiar with the operation. These persons told me that they were never contacted by Detective Madden or any other State Police Detectives. I might add that Ms. Rollins was not very knowledgeable about the program. She now has been transferred out of Surplus to another Department of the State. Detective Madden acted maliciously by accusing me of stealing State and Federal property and money before a physical inventory of the Warehouse was ever taken and an audit of the program books. I submit that not one piece of Federal or State property was found at my home or camp.

D. During the execution of the warrant at my house and camp, money and my bank books were seized, yet the warrant never mentioned money, currency or coins. The money seized was in plainly marked envelopes stating "Mother's Money" and Mother in Law's Money". No money was ever seized from the other four homes searched, with money in plain sight.

E. Detective Madden has returned some of the items seized from Robert Hathaway, i.e., overhead projector, electric heater, paper cutter. These items were clearly marked State Property and Mr. Hathaway had no receipt for the purchase of any of these items, yet Detective Madden has refused to release items to others because they were unable to

provide a receipt for such.

Dated: 7/31/97

s/ Robert J. Veilleux
Robert J. Veilleux

State of Maine
Kennebec, ss.

Sworn to me and subscribed before me this 31st day of July, A.D., 1997

s/ Wayne S. Moss
Wayne S. Moss
Attorney at Law
Admitted to the Maine Bar:
December 22, 1977